

To: Prins, Christopher[Prins.Christopher@epa.gov]
From: Mahmud, Shahid
Sent: Tue 8/11/2015 12:55:03 PM
Subject: RE: You probably have seen this - EPA Faces Unclear Superfund Liability For Colorado Mine Wastewater Spill

Thanks Chris,

Have been involved in this and preparing response to questions since last Friday.

From: Prins, Christopher
Sent: Tuesday, August 11, 2015 7:44 AM
To: Mahmud, Shahid
Subject: You probably have seen this - EPA Faces Unclear Superfund Liability For Colorado Mine Wastewater Spill

Daily News

EPA Faces Unclear Superfund Liability For Colorado Mine Wastewater Spill

Posted: August 10, 2015

EPA is facing a lawsuit from at least one tribe as well as potential legal action by states after an agency cleanup crew caused the release of about 3 million gallons of contaminated wastewater during work at a contaminated mine site in Colorado, but it is unclear whether EPA can be held liable for the spill under the waste law.

Attorneys familiar with cleanup law say that EPA will likely be sued for both natural resource damages and response damages under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund law, which would address both environmental harms from the spill and the cost of addressing drinking water contamination and other short-term issues respectively.

But the attorneys say that since CERCLA includes broad protections against liability for EPA when it performs a site cleanup, such suits face uncertain prospects -- and the litigation could set an important precedent on the issue.

Depending on the section of CERCLA the plaintiffs invoke, they might be required to show that EPA's conduct was either tantamount to that of a facility operator rather than a cleanup crew, or that it was provably negligent.

"I am not aware of a case as egregious as this, but I don't know if EPA was negligent. We don't know enough about the facts of the case to know if they did something stupid, or if it was that they were stuck with a mine that was a ticking time bomb. . . . I wouldn't close the door on it, certainly," says a Colorado environmentalist attorney.

Navajo Nation president Russell Begaye is already vowing that his government "will hold EPA accountable" for the Aug. 5 wastewater spill from Colorado's Gold King Mine into Colorado, New Mexico and Navajo waters.

State officials have not yet publicly said what legal measures they will take in response to the release, but they could potentially also pursue litigation. The spill was caused by an EPA team "working to investigate and address contamination" at the site, according to an EPA statement posted to its website Aug. 9.

"I have instructed Navajo Nation Department of Justice to take immediate action against the EPA to the fullest extent of the law to protect Navajo families and resources," Begaye said in an Aug. 9 statement.

According to EPA's statement on the spill, the agency's cleanup team inadvertently caused the release of pent-up wastewater that had been held in the mine by "unconsolidated debris near an abandoned mine portal," but exactly how the incident began has not yet been determined.

CERCLA Liability

CERCLA section 119 exempts cleanup crews, including contractors and government employees, from most liability for releases that come as a result of cleanup efforts in order to avoid discouraging site cleanups.

But courts have allowed suits under that section when the workers' actions amount to a "new release" rather than a cleanup of existing contamination, an industry attorney who focuses on environmental law told *Inside EPA*.

"There's some 9th Circuit case law and one or two district court provisions that construe the immunity provision and suggest that cleanup crews can be considered 'operators' in that situation," the attorney says.

Under that provision, the attorney continues, "I think EPA or EPA's contractor has some very serious liability concerns here" as a result of the spill.

In addition, section 107, which covers government agencies' immunity from litigation as institutions, says the agency can be sued in situations where it acts negligently, which could also cover the Gold King Mine spill.

Key to that consideration could be how closely the workers at the mine followed government reference documents, such as the National Contingency Plan (NCP), which sets out procedures for EPA and other agencies to deal with environmental contamination. Section 107 says agencies are protected from liability when they act in accordance with the NCP but not when they are negligent -- but does not specifically say that an agency that follows the NCP cannot be considered negligent.

The industry attorney says that since the NCP is a general document rather than a step-by-step guide to dealing with specific kinds of cleanup efforts, it is unclear how effective it would be as a defense.

"I'm not sure a contractor's argument that they followed the NCP, in itself, would be an absolute defense to a negligence argument," the attorney says.

States' Actions

In addition to the Navajo Nation's promised legal action, both attorneys say it is at least possible that Colorado and New Mexico, the two states that have seen environmental impacts from the spill so far, could also bring suit against the agency for environmental and other damages.

But the environmentalist attorney says that even though both states have historically been aggressive in taking action against federal sites under CERCLA, they might be hesitant to sue EPA directly.

"Even though this is a federal actor, it's a federal actor who gives the states money to run their environmental programs. If it were the Army or [the Department of Energy (DOE)], maybe, but they're used to having EPA more or less on the same side. They would not be in the same category as a federal polluter," the attorney says.

State regulators could also be wary of discouraging EPA from using federal resources to investigate and clean up disused mines for fear of legal action.

"I don't think the state would want to discourage EPA from taking over mining sites in the future. It doesn't seem like a good policy perspective to me, regardless of the law."

Also unclear is whether the waterbodies contaminated by the spill will be added to the National Priorities List for designation as Superfund cleanup sites. "That's a conversation that is ongoing," EPA Region 8 Administrator Ron Curry said on an Aug. 10 press call about the spill response. -- *David LaRoss*
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